(29)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 334

QUINCY and ILA MINGORI, Petitioners,

vs.

LYNN R. BRODERICK, Collector of Internal Revenue for the District of Kansas.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Cases Cited.

Rule Cited.

Statute Cited.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above cause on June 22, 1942.

Opinion Below.

The opinion of the Circuit Court of Appeals is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 22, 1942 (R. 117). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

A revenue officer, without notice, has undertaken to assess so-called taxes and penalties and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind. May a citizen be thus deprived of his property under the Constitution of the United States, and particularly the Fifth Amendment thereto? Does the sweep of the statute, 53 Stat. 446, preclude and deny injunctive relief, except for which, relief may be obtainable under long recognized principles of equity jurisprudence? (I. R. C. Sec. 3653.)

May special findings of fact, of the Trial Court, not clearly erroneous, be set aside on appeal?

Federal Rules of Civil Procedure, Rule 52. (U. S. C., Title 28, foll. Sec. 723.)

Statute Involved.

I. R. C.

Sec. 3653. . . . "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." . . .

Statement.

Trial was had before the Court May 27, 1941 (R. 26).

The special findings of fact of the Trial Court (R. 23-24) may be summarized as follows:

The petitioners seek a permanent injunction enjoining the defendant as Collector of Internal Revenue from conducting any proceedings by distraint or otherwise to enforce collection of a so-called tax or assessment and penalties in the amount of $18,834.21, with interest at the rate of 6 per cent per annum from January 8, 1940, or from selling, disposing of, or otherwise interfering with the free use and enjoyment of petitioner's property; that on January 29, 1940, the Collector caused to be filed a tax lien in the office of the Register of Deeds of the county; that petitioners have not been interested in any manner in any still, distillery or distilling apparatus, and were not engaged in the production of intoxicating liquors; that they have no property or funds with which to pay the so-called tax assessment and penalties; that the assessment was made without notice and based upon reports of subordinate officers in an extraneous matter, to which petitioners were not parties; that the Collector had no knowledge or information sufficient to form a belief petitioners were illicit still operators, subject to taxation as such.

The Court made findings of fact and conclusions of law, and on October 9, 1941, entered judgment permanently enjoining the Collector (R. 23-27).

On October 11, 1941, the Collector filed Notice of Appeal (R. 29-31).

On June 22, 1942, the Circuit Court of Appeals reversed and remanded the cause with directions to dismiss the action (R. 117-118).

Specification of Error to Be Urged.

The Circuit Court of Appeals erred in holding 53 Stat. 446, I. R. C. 3653, forbids issuance of an injunction, under the facts of this case specially found by the Trial Court, and in reversing the judgment based on such findings when not clearly erroneous. Federal Rules of Civil Procedure, Rule 52. (U. S. C. Title 28, foll. Sec. 723.)

Reasons for Granting the Writ.

The decision of the Court below deals with a question of great importance in federal tax litigation, and is in conflict with principles established by this Court.

> . . . "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court." . . .
>
> 53 Stat. 446, I. R. C. Sec. 3653.

Petitioners recognize the importance of the section above quoted, and the principle underlying it. However, the giving of such magic to the word "tax" would be to break down constitutional barriers protecting citizens in their property, and result in gross and indisputable oppression without adequate remedy at law.

This Court has held the statute to be inoperative in each of the following instances: First, when the assessment is in the nature of a fine or penalty, as distinguished from a tax; *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386. Second, when there exists extraordinary and exceptional circumstances; *Miller* v. *Standard Nut Margarine Company*, 284 U. S. 498; *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439. Third, when the assessment is arbitrarily and capriciously made.

To permit the sale of petitioners' property for a tax they do not owe would be arbitrary and oppressive, and would destroy their business and inflict loss for which they have no adequate remedy at law.

In *Allen* v. *Regents of the University of Georgia*, 304 U. S. 439, 82 L. Ed. 1448, 58 S. Ct. 980, the petition, among other things, challenged the respondent's ability to maintain suit to enjoin the collection of the tax. The Court ruled as follows:

> "The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The respondent in good faith believes that an unconstitutional burden is laid directly upon its transactions in the sale of licenses to witness athletic exhibitions conducted under authority of the State and for an essential governmental purpose. The State is entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied. It is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled, if no part of the sum collected was a tax, and if the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States. And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity."

In the same case Mr. Justice Reed, concurring specially in the result, 304 U. S. l. c. 455, said:

> "Section 3224 was enacted in 1867 and until recent years was followed by the courts without deviation. Exceptions were made to protect taxpayers against collection of penalties. In an exceptional case of 'special and extraordinary' circumstances, where a 'valid . . . tax could by no legal possibility have been assessed against respondent . . .' this Court per-

mitted an injunction. 'Special and extraordinary' circumstances have multiplied."

Moreover some of the lower federal courts have regarded the views expressed by the Circuit Court of Appeals as inconsistent with the decisions of this court or have otherwise sharply criticised the result.

The action of the Internal Revenue Department in making assessments of taxes for illegal manufacture of liquor, filing liens and issuing warrants of distraint against citizens who have no notice or knowledge of the proceedings and who have not in any manner been connected with or interested in the operation of any still, distillery or distilling apparatus based upon reports of investigators of the Alcohol Tax Unit is without authority in law.

It is evident that the imaginations of these agents have been allowed to take unrestrained flight and, further, their acts have in many instances been such as to transgress the sacred barriers provided by the Constitution for the protection of person and property in this country. See *Ledbetter* v. *Bailey*, 274 Fed. 375. See also *Driscoll* v. *Jones*, 19 F. Supp. 792.

Conclusion.

It is, therefore, respectfully requested that this petition for a writ of certiorari be granted.

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CITATIONS

484206—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 334

QUINCY AND ILA MINGORI, PETITIONERS

v.

LYNN R. BRODERICK, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its findings and conclusions appear at R. 23–25. The opinion of the Circuit Court of Appeals (R. 115–117) is reported in 128 F. 2d 996.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 22, 1942. (R. 117.) The petition for a writ of certiorari was filed on August 24, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Will injunction lie to restrain the collection of taxes on distilled spirits duly assessed by the Commissioner of Internal Revenue under color of office?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.[1]
>
> (a) *Tax.*—* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * * *

(U. S. C., Title 26, Sec. 3653.)

STATEMENT

This is a proceeding to restrain the collection of taxes duly assessed by the Commissioner of Internal Revenue on distilled spirits, a liquor dealer's tax and percentage additions thereto as required by law, in the amount of $17,937.34, for the taxable period November 1, 1936, to June 30, 1938. (R. 9.)

Defendant's motion to dismiss (R. 17) was overruled (R. 18). Thereupon an answer was filed without waiving the grounds of the motion. (R. 19.) At the trial which ensued it was shown that the tax had been assessed by competent authority as a result of an investigation made by the Bureau of Internal Revenue. (R. 23, 24, 46, 48, 97–105.)

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[1] Formerly Section 3224, Revised Statutes.

The District Court found that the petitioners had not been engaged in activities subject to the taxes imposed, and were not possessed of funds or property with which to pay the amounts assessed.

Judgment was entered on October 9, 1941 (R. 26–27), permanently restraining the Collector. An appeal (R. 27–32) was taken to the Circuit Court of Appeals and the judgment of the District Court was reversed (R. 117–118). By order of August 11, 1942, Lynn R. Broderick, Collector of Internal Revenue, was substituted for former Collector Burke. (R. 118–119.)

ARGUMENT

1. Section 3653 of the Internal Revenue Code (formerly Section 3224 of the Revised Statutes) prohibits the maintenance of any suit for the purpose of restraining the assessment or collection of a federal tax. Despite the broad sweep of the section injunctions have been permitted in several cases where exceptional and extraordinary circumstances were thought to exist. Although the dissents in *Miller* v. *Nut Margarine Co.*, 284 U. S. 498, and *Allen* v. *Regents*, 304 U. S. 439, indicate that the recognition of exceptions to the statute is questionable, the decisions which have announced such exceptions are distinguishable here on their facts.

The tax on distilled spirits imposed by the Liquor Tax Act of 1934 is a basic production tax of $2 per proof or wine gallon whether legally or illegally distilled. It is a tax on the product and not a

penalty. The tax and a lien therefor attaches as soon as the product is in existence. *Various Items* v. *United States,* 282 U. S. 577, 579; *United States* v. *Rizzo,* 297 U. S. 530, 533; *United States* v. *One Ford Coupe,* 272 U. S. 321, 328.

The special tax on wholesale liquor dealers imposed by Sections 3232, 3237, as amended, and 3244 of the Revised Statutes is also a tax and not a penalty. *United States* v. *Constantine,* 296 U. S. 287, 293–294; *Sonzinsky* v. *United States,* 300 U. S. 506, 512, 514. The percentage additions to the tax are not penalties but incidents of the assessment and collection of the tax as a part thereof. *Helvering* v. *Mitchell,* 303 U. S. 391, 403.

Accordingly decisions restraining the collection of penalties are not in point. In that class fall *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, which involved specific penalties and taxes required to be doubled under Section 35, Title II, of the National Prohibition Act. With respect to those cases this Court in *Graham* v. *du Pont,* 262 U. S. 234, 257, said that they "were not cases of enjoining taxes at all. They were illegal penalties in the nature of punishment for a criminal offense."

The internal revenue laws provide a complete and adequate remedy at law by paying the tax and suing to recover it. *Graham* v. *du Pont, supra,* at 254–255; cf. *Kohn* v. *Central Distributing Co.,* 306 U. S. 531. The same remedy is applicable to liquor taxes. Whether or not a liquor tax is rightfully due

may only be determined in a suit for refund. *Jacoby* v. *Hoey,* 86 F. 2d 108 (C. C. A. 2d), certiorari denied, 299 U. S. 613; *Larson* v. *House,* 112 F. 2d 930 (C. C. A. 5th); *Rothensies* v. *Lichtenstein,* 91 F. 2d 544 (C. C. A. 3d).

2. No exceptional circumstances are here involved which would justify the application of *Allen* v. *Regents* or *Miller* v. *Nut Margarine Co., supra.* Assertions that the tax is illegal and unconstitutional are insufficient to create an exception warranting injunctive relief. *Dodge* v. *Osborn,* 240 U. S. 118, 121–122; *Bailey* v. *George,* 259 U. S. 16. Hardship and inability to pay the tax do not create an exception. In *Jacoby* v. *Hoey,* 15 F. Supp. 388 (S. D. N. Y.), affirmed, 86 F. 2d 108 (C. C. A. 2d), certiorari denied, 299 U. S. 613, the complaint alleged that the taxpayer had no funds available to pay the tax and would suffer irreparable loss, but injunctive relief was denied. See also *Coletti* v. *Cassidy,* 12 F. Supp. 21 (Wyo.); *Kessler* v. *Rothensies,* 15 F. Supp. 387 (E. D. Pa.). The irreparable injury must be such that a money award would not be adequate. *Red Star Yeast & Products Co.* v. *La Budde,* 83 F. 2d 394, 396 (C. C. A. 7th). Cf. *Larson* v. *House,* 112 F. 2d 930 (C. C. A. 5th), where injunction was denied although the taxpayers had been acquitted of a charge of conspiracy to violate the Prohibition Act.

3. The action of the Commissioner in assessing the taxes was not arbitrary or capricious. The assessments were made in due course under color

of office upon reports submitted by revenue officers after investigation. The Commissioner is empowered by law to make the assessment upon evidence in his possession. *Jacoby* v. *Hoey*, 86 F. 2d 108, 109 (C. C. A. 2d); *Rothensies* v. *Lichtenstein*, 91 F. 2d 544, 546 (C. C. A. 3d).

4. The reversal by the Circuit Court of Appeals was on the ground that the District Court was without jurisdiction. In such a situation Rule 52 of the Federal Rules of Civil Procedure is clearly inapplicable. If the District Court had no jurisdiction to receive evidence, its findings must be ignored so far as they depend upon the evidence.

CONCLUSION

This case does not present a problem of general importance. There is no conflict of decisions. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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